IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.2610 OF 2005

Mahinder Singh Balwant Singh Oberai,
an Indian inhabitant, residing at
11, Tulshi Mahal, 26th Road, Opp.
St. Theresa School, Bandra (West),
Mumbai--400 050. : Petitioner

V/s.

1. The State of Maharashtra,
   through the Secretary to the
   Government of Maharashtra,
   Home Department (Special),
   Mantralaya, Mumbai--400 032.
2. Smt.Neela Satyanarayana,
   The Principal Secretary
   (Appeals & Security),
   Government of Maharashtra,
   Home Department (Special),
   Mantralaya, Mumbai--32.
3. The Superintendent of Prison,
   The Mumbai Central Prison,
   Arthur Raod, Mumbai.
4. The Superintendent of Prison,
   The Nashik Road Central Prison,

Nashik Road, Maharashtra. : Respondents

Mr.Maqsood Khan for the petitioner.

Mrs.A.S.Pai, Addl. Public Prosecutor for the respondents.

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CORAM : D.G.DESHPANDE & S.A.BOBDE,JJ.

DATE : AUGUST 4, 2006.

ORAL JUDGEMENT (Per S.A.Bobde,J.)

1. The petitioner has challenged his brother's, (hereinafter referred to as the "detenu") detention by order of detention dated 2.4.2004 under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as the "Act". The petitioner has prayed for issue of a writ of habeas corpus to secure the detenu's release. The order of detention along with the grounds of detention was served upon the detenu on 13.10.2005.

2. The detenu had made a representation to the detaining authority, the State Government, the Central Government and the State Advisory Board. In the return filed by the detaining authority, it is submitted that a composite representation dated 18.10.2005 was addressed to the Chairman, Advisory Board; the detaining authority and the State Government which was received in the Department through the Nasik Road Central Prison on 19.10.2005. The said representation was processed at

various stages and after considering the same, on 18.11.2005 a reply rejecting the representation was forwarded to the detenu.

3. From the detention order itself and the grounds of detention served along with it, it is clear that the detention is to prevent the detenu from "dealing in smuggled goods", a ground provided by section 3(1)(iv) of the Act. Indeed, the learned Addl. Public Prosecutor appearing for the respondents did not dispute that the detention is under section 3(1)(iv). Section 3(1) confers the power to detain any person with a view to preventing him from--

> "(i) smuggling goods, or
>
> (ii) abetting the smuggling of goods, or
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> (iii) engaging in transporting or concealing or keeping smuggled goods, or
>
> (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
>
> (v) harbouring persons engaged in smuggling

goods or in abetting the smuggling of goods,"

4. The only point raised on behalf of the detenu is that the detention order suffers from a non-application of mind, in that none of the grounds of detention and the facts taken into account discloses that the detenu may be validly detained for dealing in smuggled goods covered by clause (iv) above.

5. It is, therefore, necessary to examine the grounds. In brief, the detenu has been detained because apparently he allowed use of his Import Export Code Number, hereinafter referred to as "IEC number", to two persons, viz., Pradeep Kashid and Baldev Perhar, who in turn smuggled certain electronics goods from Dubai such as T.V., VCD players, battery cells, etc., in the guise of importing wooden frames with photographs. This is said to have been done in two containers bearing Nos.CRXU-9403134 and CRXU-9332257 imported by M/s.Omkar Manufacturer i.e. the detenu’s firm, under the aforesaid IEC number.

6. There is no dispute that the detention is based on an arrangement by the detenu with the said Kashid and Baldev that he would allow them to import consignments in the

name of his firm and its IEC number, for a consideration for Rs.7,000/- as compensation per container. It appears that the detenu used to do business in the name of M/s.Omkar Manufacturer in Goa and had shifted to Mumbai since the year 2000.

7. In Mumbai, it appears that he agreed to allow the aforesaid Pradeep Kashid and Baldev Singh Perhar who had imported one consignment for him earlier, to use the IEC number of his firm for importing goods for a consideration of Rs.7,000/- per container. Accordingly, two containers were imported. As stated above, besides the wooden photo frames and 100% polyester fabrics which they were supposed to contain, they were found to contain compact 5.5" black and white T.V. with AM/FM radio, caller I.D., VCD/CD/MP3 player on which duty was not paid. The detenu's premises were searched and he was arrested. The Court of the Addl. Chief Metropolitan Magistrate's Third Court, Esplanade, Mumbai, remanded him to judicial custody till 5.9.2003.

8. In the course of investigation, various statements referred to in the grounds of detention were recorded under section 108 of the Customs Act in which the detenu has stated that he had given his IEC number to the said Kashid and Perhar for a consideration. The detenu stated

that he had not imported the consignments nor had he made any payments for the same.

9. Apparently, the detenu's version turned out to be similar to the version of Kashid who had stated that they had agreed to pay Rs.7,000/- per consignment to the detenu and thereupon imported two containers in the name of the business firm M/s.Omkar Manufacturer, Goa. Kashid stated that he and Perhar had appeared and filed Bill of Entry nos.812 and 813 in the name of the detenu's firm M/s.Omkar Manufacturer and declared the containers as wooden photo frames of 100% polyester fabrics container; that for filing the said two Bills of Entry, they had used the IEC number of M/s.Omkar Manufacturer. Several other statements were also recorded.

10. On a perusal of the said statements, the detaining authority vide para 21 came to the conclusion that the detenu conspired with Kashid and Perhar for illegally importing electronics goods under the guise of wooden photo frames and "willfully allowed the above two persons to use the Import Export Code Number of your firm for importing the goods, for a consideration of Rs.7,000/- per container". Further, the detaining authority has come to the conclusion as under:-

"You were also aware that these goods have been ordered, arranged and handled by the above-mentioned two persons and wilfully allowed Shri Pradeep Kashid and Shri Baldev Singh to handle all the formalities such as preparation of Bills of Entry, filing with customs department, dealing with the Shipping Lines, attending examination of goods done by customs officer, taking delivery order from the Shipping Lines and all the customs formalities in respect of the goods imported in your firm's name and purported to be cleared illegally without declaring the same to customs authorities. During the investigation, you concealed from the DRI Officers at the time of giving your first statement before DRI, that you had met the other co-conspirators viz. Shri Pradeep Kashid and Shri Baldev Singh Perhar on 27/8/2003 before coming to DRI office. Further also did not reveal the addresses of the above two persons, who were the main conspirators, whom you had aided and abetted in commissioning of the incriminating smuggling activity in the instant case."

It is important to note that there is no mention of any fact of the detenu having dealt with any smuggled goods. On the above facts, the detaining authority came to the unusual conclusion vide para 24 that the detenu is involved in dealing in smuggled goods.

11. It is, therefore, necessary to consider whether the detention which is intended to prevent the detenu from dealing in smuggled goods is valid. "Dealing in smuggled goods" is a separate and distinct ground provided by clause (iv) of section 3(1). Clause (iv) of section 3(1) reads as follows:-

> "(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or"

On a plain reading of the language of that clause, it is clear that it provides for detention of a person "with a view to preventing him from dealing in smuggled goods" and not for the other activities provided by other clauses such as smuggling goods [clause (i)], or abetting the smuggling of goods [clause (ii)], or engaging in transporting or concealing or keeping smuggled goods [clause (iv)], or harbouring persons engaged in smuggling

goods or in abetting the smuggling of goods [clause (v)].

12. "Dealing" is a word of wide import which, inter alia, means "to have to do in any way". Its natural meaning has not been curtailed by the Act. It is a word of wide import and its meaning cannot be restricted. However, for clause (iv) to be attracted, the apprehension must be that the person would deal in smuggled goods i.e. goods which have acquired the character of smuggled goods i.e. after they have been smuggled.

13. This clause does not cover dealing with goods before they are smuggled. That contingency is covered by clauses (i) and (ii). It is thus clear that the ground provided by clause (iv) cannot be invoked where the activities sought to be prevented are activities covered by the other clauses. This ground provided by this clause will certainly not be available to the detaining authority where the person is said to have conspired with others to import goods illegally by lending his IEC number. That would be in the nature of abetting the activity of smuggling.

14. It is true that a person’s activities may be such that it may attract more than one clause such as

smuggling [clause (i)], or abetting the smuggling [clause (ii)], as well as dealing in smuggled goods [clause (iv)]. However, in that case, the grounds of detention must clearly refer to the specific activities covered by several clauses. The detention order in that case must also state that a person is being detained with a view to preventing him from doing one of the prohibited activities on the basis of an apprehension based on facts relevant to that ground.

15. Having considered the matter, in this view, it seems clear that the impugned order suffers from non-application of mind under section 3(1) of the Act. It is difficult to see how the detaining authority, after having concluded that the detenu allowed the use of his IEC number for importing goods as distinct from smuggling of goods by permitting two other persons to do all the acts necessary for importing the goods, decided to detain the detenu with a view to prevent him from dealing in smuggled goods. There appears to be no overt-act by the detenu for smuggling goods or otherwise dealing with them other than by allowing his licence to be used for the purpose of import. It appears that the detenu’s activities are in the nature of abetment of smuggling activities by allowing the use of his IEC number and there is no material to show that he dealt with any

smuggled goods.

16. It is a settled law that the five clauses in sub-section (1) of section 3 provides for separate and distinct grounds for detention vide Narendra v. B.B.Gujral (A.I.R. 1970 SC 420) para 27. As observed earlier, there may indeed be an overlap and a person's activities may involve the abetment of smuggling as well as actual smuggling and in such a case, the detention order which is designed to prevent smuggling may nonetheless enable the detention of a person who has been found to abet smuggling where the facts justify an inference that the person has engaged in both activities vide paragraphs 28 to 34 of Narendra's case (supra). However, the facts must justify the invoking of a distinct and separate ground provided by the various clauses. It cannot be that the detaining authority refers to all facts pertaining to, say the activity of smuggling, and then detains a person with a view to prevent him from harbouring persons engaged in smuggling of goods [clause (v)] without referring to any facts which give rise to the apprehension that the person may harbour others engaged in smuggling. In the present case, the grounds of detention do not refer to the detenu having dealt with any smuggled goods or having exhibited the intention of dealing in smuggled goods.

17. Mrs.Pai, the learned Addl. Public Prosecutor for the respondents, pointed out that the detenu told the D.R.I. that he would pay appropriate duty an take delivery of the goods. That cannot be taken as an intention of dealing in smuggled goods since obviously if such duties are allowed to be paid in the discretion of the authorities, such goods would not be smuggled goods. In any case, it is clear from the conclusion drawn by the detaining authority vide para 21 that it is of view that the detenu conspired with the said Kashid and Perhad to illegally import by mis-declaring the goods to the customs authorities and to clear them illicitly. Further that the detenu wilfully allowed the two persons to use his IEC number for a consideration of Rs.7,000/- per container. None of these conclusions can be said to justify the detention on the ground that the detenu may deal with smuggled goods. There is no reference to any dealing in smuggled goods by the detenu in the past nor any preparation for doing so in future.

18. In taking this view, we do not intend to hold that a person who is found to have abetted smuggling of goods cannot be detained with a view to prevent him from dealing in smuggled goods. The authority may do so after referring to such activity which justifies the

apprehension that the detenu would deal in smuggled goods. The detaining authority would not be entitled to refer to the facts pertaining to one ground which is separate and distinct and then detain a person for another ground. It is settled law that the precise ground for detention must exist and be communicated to the detenu to enable him to make a representation in order to comply with his rights under Article 22(5) of the Constitution of India. Indeed, a detenu who is detained with a view to prevent him from dealing in smuggled goods is entitled to know the grounds which give rise to such an apprehension in the mind of the detaining authority in order to make an effective representation.

19. In the result, the petition is allowed. The impugned order of detention is quashed and set aside. The detenu - Harvinder Singh Balwant Singh Oberai shall be set at liberty forthwith, unless required in any other case. The rule is made absolute.

D.G. DESHPANDE, J.

S.A. BOBDE, J.